Case C-182/08

Glaxo Wellcome GmbH & Co. KG

v

Finanzamt München II

(Reference for a preliminary ruling
from the Bundesfinanzhof)

(Freedom of establishment and free movement of capital — Corporation tax — Acquisition of shares in a capital company — Conditions for taking into account, when determining the acquirer's tax base, the reduction in value of the shares resulting from the dividend distribution)

Opinion of Advocate General Bot delivered on 9 July 2009 . . . . I - 8596
Judgment of the Court (First Chamber), 17 September 2009 . . . . I - 8632

Summary of the Judgment

1. *Free movement of capital — Provisions of the Treaty — Scope*
   (EC Treaty, Arts 52 and 73b (now Arts 43 EC and 56 EC))

2. *Free movement of capital — Restrictions — Tax legislation — Corporation tax*
   (EC Treaty, Art. 73b (now Art. 56 EC))

1. Legislation of a Member State under which the reduction in value of shares as a result of a distribution of dividends does not affect the basis of assessment for a resident taxpayer when that taxpayer has acquired shares in a resident capital company from a non-resident shareholder whereas, had those shares been acquired from a resident shareholder, such a reduction in value would have reduced the acquirer's basis of assessment, must be examined exclusively with regard to free movement of capital. The purpose of the legislation at issue in the main proceedings being to prevent non-resident shareholders from obtaining an undue tax advantage directly through the sale of shares with the sole objective of obtaining that advantage, and not with the objective of exercising freedom of establishment or as a result of exercising that freedom, it must be held that the free movement of capital aspect of that legislation prevails over that of the freedom of establishment. Consequently, even if that legislation has restrictive effects on the freedom of establishment, they are the unavoidable consequence of any restriction on the free movement of capital and, therefore, do not justify an independent examination of that legislation in the light of Article 52 EC.

(see paras 50-52)

2. Article 73b of the EC Treaty (now Article 56 EC) must be interpreted as not precluding legislation of a Member State which excludes the reduction in value of shares as a result of the distribution of dividends from the basis of assessment for a resident taxpayer, when that taxpayer has acquired shares in a resident capital company from a non-resident shareholder, whereas, had the shares been acquired from a resident shareholder, such a reduction in value would have reduced the acquirer's basis of assessment. This applies in cases where such legislation does not exceed what is necessary to maintain a balanced allocation of the power to impose taxes between the Member States and to prevent wholly artificial arrangements which do not reflect economic reality and whose only purpose is unduly to obtain a tax advantage. It is for the national court to examine whether that legislation is limited to what is necessary in order to attain those objectives.

The grant to a resident taxpayer of the right to deduct from his taxable profits the losses relating to the partial reduction referred to above only when he acquires shares from a resident shareholder, indeed makes shares held by non-residents less attractive and is, therefore, likely to dissuade the resident taxpayer from acquiring them. Such a difference in treatment is also likely to dissuade non-resident investors from acquiring shares in the resident company and therefore to represent an obstacle to that company's accumulation of capital

from other Member States, with the result that such legislation constitutes a restriction on the free movement of capital which is prohibited, in principle, by Article 73b of the Treaty.

That difference in treatment does not reflect an objective difference in the situations of resident shareholders because, with regard to the losses resulting from a reduction in value of the shares held in a resident company, those shareholders are in a comparable situation, whether the shares are acquired from a resident or acquired from a non-resident. The distribution of profits reduces the value of a share, whether it was previously acquired from a resident or a non-resident, and in both cases that reduction in value is borne by the resident shareholder.

Furthermore, in the absence of a direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, the legislation at issue cannot be justified by the need to preserve the coherence of the full imputation taxation system. In that regard, the disadvantages resulting from that legislation are suffered directly by the resident shareholder who has acquired those shares from a non-resident. For that resident shareholder, the impossibility of deducting from his taxable profits the losses related to the reduction in the value of the shares held in the resident company, where the reduction in value of the shares results from the distribution of the profits, is not offset by any tax advantage.

However, such legislation may be justified by the need to maintain a balanced allocation of the power to impose taxes between the Member States, for transactions other than the distribution of dividends, allowing the non-resident shareholder to obtain the same result from an economic point of view as if he had been granted the tax credit in respect of the corporation tax paid by the company in which he holds the shares, could equally undermine the ability of the Member State where that company resides to exercise its right to tax a profit generated by an economic activity undertaken in its territory. By restricting the right of the new shareholder to deduct from his taxable profits the losses resulting from the reduction in value of the shares concerned, to the extent that they do not exceed the ‘blocked amount’, equal to the difference between the acquisition price paid by the resident shareholder and the nominal value of the shares, that legislation is capable of preventing practices which have no objective other than to obtain for the non-resident shareholder a tax credit for the corporation tax paid by the resident company. In addition, the increase in the basis of assessment of the new shareholder as a result of that limitation is designed to ensure that profits which would usually be taxed in the Member State concerned are not transferred, as part of the profit made by the non-resident former shareholder equal to the undue tax credit, without being taxed in that Member State. Consequently, such legislation is capable of achieving the objective of maintaining a

balanced allocation of the power to impose taxes between the Member States and of preventing wholly artificial arrangements which do not reflect economic reality and whose only purpose is to obtain a tax advantage.

Nevertheless, it is necessary to establish that such legislation does not go beyond what is necessary to attain the objectives thus pursued. In that regard, it is for the national court to determine whether, to the extent that the calculation of the blocked amount is based on the acquisition costs of the shares concerned, the consequences of that legislation exceed what is necessary to ensure that a sum equal to the tax credit is not unduly granted to the non-resident shareholder. It cannot be excluded that the shares were sold at more than their nominal value for reasons other than in order to obtain for the shareholder a tax credit for the corporation tax paid by the resident company or, in any case, that the undistributed profits and the possibility of obtaining a tax credit relating to those shares constitute only one element of their selling price. In addition, the taking into account of the blocked amount and the increase in the resident shareholder's basis of assessment also have consequences for other taxes levied on the shareholder and, in particular, for the trade tax payable by him, being consequences which go beyond what is necessary to attain the objectives pursued by the legislation.

It is also for the national court to establish whether the restriction on taking into account the reduction in value of the shares resulting from the distribution of the dividends as from the year of acquisition of those shares and during the following nine years, as provided for by the legislation, does not exceed what is necessary to attain the objectives pursued by it. Finally, in order to comply with the principle of proportionality, a measure pursuing the objective of preventing wholly artificial arrangements which do not reflect economic reality and whose only purpose is unduly to obtain a tax advantage, must enable the national court to carry out a case-by-case examination, taking into account the particular features of each case, based on objective elements, in order to assess the abusive or fraudulent conduct of the persons concerned.

To the extent that the legislation cannot be limited to wholly artificial arrangements, established on the basis of objective elements, but covers all cases in which a

resident taxpayer has acquired shares in a resident company from a non-resident shareholder at a price which, for whatever reason, exceeds the nominal value of those shares, the effects of such legislation exceed what is necessary in order to attain the objective of preventing wholly artificial arrangements which do not reflect economic reality and whose only purpose is unduly to obtain a tax advantage.

(see paras 56-59, 73, 74, 78, 80, 81, 84, 88, 91-94, 96-102, operative part)